IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

ISRAEL ALVARADO-REYES,

OPINION AND ORDER

Plaintiff,

v.

13-cv-863-wmc

KRISTINE A. LYON and the WISCONSIN DEPARTMENT OF CORRECTIONS,

Defendants.

Plaintiff Israel Alvarado-Reyes has filed a proposed civil action pursuant to 42 U.S.C. § 1983, alleging that he was denied adequate medical care while incarcerated by the Wisconsin Department of Corrections. Plaintiff requests leave to proceed *in forma pauperis* and has made an initial, partial payment toward the full filing fee for this lawsuit. *See* 28 U.S.C. § 1915(b)(1). Because he is incarcerated, the court is required by the Prison Litigation Reform Act to screen the complaint and dismiss any portion that is frivolous, malicious, fails to state a claim upon which relief may be granted or seeks money damages from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b). In addressing any *pro se* litigant's complaint, the court must read the allegations generously, reviewing them under "less stringent standards than formal pleadings drafted by lawyers." *Haines v. Kerner*, 404 U.S. 519, 521 (1972). Even under this lenient standard, the complaint must be dismissed for reasons outlined briefly below.

ALLEGATIONS OF FACT*

Plaintiff Alvarado-Reyes is currently incarcerated by the Wisconsin Department of

* For purposes of this order, the court accepts the plaintiff's well-pleaded allegations as true and assumes the following probative facts.

Corrections ("WDOC") at the Stanley Correctional Institution. At all times relevant to this complaint, however, Alvarado-Reyes was in the custody at WDOC's Waupun Correctional Institution ("WCI"), where defendant Kristine A. Lyon is employed as an advanced practice nurse practitioner ("APNP").

Alvarado-Reyes's claim centers around the alleged denial of treatment for pain in his left ear. On August 30, 2010, Lyon treated Alvarado-Reyes for a toenail infection. At that time, Alvarado-Reyes also complained of pain in his left ear that had continued for approximately ten days. Lyon conducted an examination and noted that he had placed toilet paper in the canal of his ear. She prescribed eardrops to treat a middle ear infection. In particular, she prescribed "Ofloxacin 0.3% solution," five drops in the left ear for seven days for "externa otitis," which describes a painful inflammation commonly known as "Swimmer's ear."

On September 2, 2010, Alvarado-Reyes reported that the pain in his ear was gone, but that he had buzzing in the ear and decreased hearing. A nurse examined the ear and found that it was normal. During a follow-up appointment with a nurse on September 8, his ear examination was also normal.

On or around September 10, 2010, however, plaintiff again contacted the Health Services Unit ("HSU") to report a "serious problem" with his left ear. On September 13, a nurse practitioner scheduled an audiogram, which took place on September 17. The results indicated deafness in his left ear.

On September 20, 2010, Alvarado-Reyes was again seen by a nurse practitioner, who performed several tests to gauge the level of his hearing loss. Thereafter, the nurse

practitioner referred Alvarado-Reyes to a doctor.

On October 18, 2010, Alvarado-Reyes was seen by a doctor. He did not, however, discuss his ear or his hearing loss, focusing instead on concerns with a hernia. Alvarado-Reyes had another appointment scheduled for February 1, 2011, but refused to be seen.

Alvarado-Reyes attributes his deafness to Lyon's failure to "properly diagnose and treat" his left ear. Alleging that Lyon negligently provided him with the wrong medical treatment, causing his hearing loss, Alvarado-Reyes asserts a violation of the Eighth Amendment prohibition against "cruel and unusual punishment." He claims further that WDOC is generally liable for failing to provide him with adequate medical care. Alvarado-Reyes specifically requests punitive damages in the amount of $100,000 and "noneconomic damages" in the amount of $200,000.

OPINION

A complaint may be dismissed for failure to state a claim where the plaintiff alleges too little, failing to meet the minimal federal pleading requirements found in Rule 8 of the Federal Rules of Civil Procedure. Rule 8(a) requires a "'short and plain statement of the claim' sufficient to notify the defendants of the allegations against them and enable them to file an answer." *Marshall v. Knight*, 445 F.3d 965, 968 (7th Cir. 2006). While it is not necessary for a plaintiff to plead specific facts, he must articulate "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In doing so, a plaintiff may plead himself out of court. *See Tamayo v. Blagojevich*, 526 F.3d 1074, 1086 (7th Cir. 2008); *see also Jackson v.*

Marion County, 66 F.3d 151, 153-54 (7th Cir. 1995) ("[A] plaintiff can plead himself out of court by alleging facts which show that he has no claim, even though he was not required to allege those facts. Allegations in a complaint are binding admissions, and admissions can of course admit the admitter to the exit from the federal courthouse.") (citations omitted)). In that respect, when a plaintiff pleads facts showing that he does not have a claim, the complaint should be dismissed "without further ado." *Thomson v. Washington*, 362 F.3d 969, 970-71 (7th Cir. 2004).

Section 1983 provides a remedy or private right of action against "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983. To establish liability under § 1983, a plaintiff must establish that (1) he had a constitutionally protected right; (2) he was deprived of that right in violation of the Constitution; (3) the defendant intentionally caused that deprivation; and (4) the defendant acted under color of state law. *Cruz v. Safford*, 579 F.3d 840, 843 (7th Cir. 2009); *Schertz v. Waupaca County*, 875 F.2d 578, 581 (7th Cir. 1989).

As outlined above, Alvarado-Reyes alleges that he was denied adequate medical care in violation of the Eighth Amendment. To state an Eighth Amendment violation for the denial of medical care, a prisoner must allege facts from which it can be inferred that prison officials were deliberately indifferent to a serious medical need. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). A prison official acts with deliberate indifference if he intentionally disregards a known, objectively serious medical condition that poses an

excessive risk to an inmate's health. *See Farmer v. Brennan*, 511 U.S. 825, 837 (1994). Serious medical conditions include: (1) those that are life-threatening or that carry risk of permanent serious impairment if left untreated; (2) those in which the deliberately indifferent withholding of medical care results in needless pain and suffering; and/or (3) conditions that have been "diagnosed by a physician as mandating treatment." *Gutierrez v. Peters*, 111 F.3d 1364, 1371-73 (7th Cir. 1997).

While Alvarado-Reyes' deafness certainly constitutes a "permanent serious impairment," his complaint must be dismissed for two reasons. First, Alvarado-Reyes cannot maintain an Eighth Amendment claim against WDOC because, as a state agency, it is immune from a suit for money damages. The Eleventh Amendment "precludes a citizen from suing a state for money damages in federal court without the state's consent." *Wynn v. Southward*, 251 F.3d 588, 592 (7th Cir. 2001). As a state agency, "defendant [Wisconsin] Department of Corrections enjoys the state's Eleventh Amendment immunity from federal lawsuits." *Arndt v. Wisconsin Dep't of Corr.*, 972 F. Supp. 475, 477 (W.D. Wis. 1996); *see also Kroll v. Bd. of Trustees of Univ. of Illinois*, 934 F.2d 904, 907 (7th Cir. 1991); *Van Patten v. D.O.C.*, No. 06-cv-374-bbc, 2006 WL 3017285, at *3 (W.D. Wis. Oct. 18, 2006) ("Wisconsin Department of Corrections and Bureau of Prison Health Services are not proper respondents to [a] petitioner's § 1983 claims."). Because Wisconsin has not waived its immunity from suits brought under § 1983, the claim against WDOC must be dismissed.

Second, accepting all of his allegations as true, Alvarado-Reyes has not stated an Eighth Amendment claim against Lyon for the denial of medical care. A prison official

violates the Eighth Amendment's prohibition against cruel and unusual punishment *only* when her conduct demonstrates "deliberate indifference" to a prisoner's serious medical needs, thereby constituting an "unnecessary and wanton infliction of pain." *Wilson v. Seiter*, 501 U.S. 294, 297 (1991) (quoting *Estelle*, 429 U.S. at 104). Inadvertent error, negligence and even gross negligence are insufficient grounds to invoke the Eighth Amendment. *Vance v. Peters*, 97 F.3d 987, 992 (7th Cir. 1996). To the extent that Alvarado-Reyes contends that he was given the wrong medication, his claim sounds in negligence. Allegations of medical malpractice or negligence, however, do not demonstrate deliberate indifference or implicate a constitutional violation of the Eighth Amendment. *Estelle*, 429 U.S. at 107; *see also Arnett v. Webster*, 658 F.3d 742, 751 (7th Cir. 2011) ("Deliberate indifference is 'more than negligence and approaches intentional wrongdoing.'") (quotation omitted); *Duckworth v. Ahmad*, 532 F.3d 675, 679 (7th Cir. 2008) ("Deliberate indifference is not medical malpractice; the Eighth Amendment does not codify common law torts."). Even a medical negligence claim would appear barred by Wisconsin's applicable statute of limitations by the time this suit was filed. *See* Wis. Stat. § 893.55(1m).

Accordingly, his complaint fails to state a claim upon which relief can be granted under 42 U.S.C. § 1983.

ORDER

IT IS ORDERED that:

1. Plaintiff Isreal Alvarado-Reyes's request for leave to proceed is DENIED and the complaint is DISMISSED with prejudice for failure to state a claim upon which relief can be granted under 42 U.S.C. § 1983.
2. The dismissal will count as a STRIKE for purposes of 28 U.S.C. § 1915(g).
3. Plaintiff is advised that once he accumulates three strikes, he will no longer be eligible to bring a civil action or appeal unless the pleadings reflect that he is under imminent danger of serious physical injury. 28 U.S.C. § 1915(g).

Entered this 6th day of January, 2015.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge